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In the Supreme Court of the United States

No. 901

OCTOBER TERM, 1969.

UNITED BONDING INSURANCE COMPANY,
Petitioner,

vs.

ASHWOOD CONSTRUCTION COMPANY, *et al.,*
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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In the Supreme Court of the United States

No. _____.

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vs.

ASHWOOD CONSTRUCTION COMPANY, *et al.,*

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit made and entered on the 4th day of September, 1969.

OPINIONS BELOW.

The case was tried in the United States District Court for the Northern District of Ohio, Eastern Division. The opinion of the Honorable Girard E. Kalbfleisch was filed January 10, 1968 and is reprinted as Appendix 1 and annexed hereto.

An appeal was perfected to the United States Circuit Court for the Sixth Circuit. The opinion of the United States Court of Appeals is reprinted as Appendix 2 and annexed hereto.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Sixth Circuit was made and entered on the 4th day of September, 1969. Jurisdiction of this Court is invoked under favor of 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the motion of United Bonding Insurance Company, petitioner herein, to dismiss Ashwood Construction Company as a party to the proceedings should have been granted?

2. Whether, at the time of performance, namely May 15, 1965, was the respondent Ashwood Construction Company financially unable to perform its contract, thus discharging the petitioner as surety?

3. Whether there was a substantial or cardinal alteration of the contract between principal and the obligee thus discharging the obligation for the surety?

4. Whether the performance bond in question was a direct action bond extending to subcontractors and materialmen, not parties to the same, or whether they are fully protected under their mechanics' lien rights.

5. Whether the negotiations between Central Excavating Company, one of the respondents, and United Bonding Insurance Company, the petitioner, resulted in a contract and if so, to what extent did Central perform that contract?

6. Whether one, a surety, or who through others, substantially performs a contract is entitled to payment or credit quantum meruit, or being compelled to pay the debt of a principal is entitled to subrogation?

STATUTE INVOLVED.

The Statute involved is Section 2307.05 Ohio Revised Code which provides:

> "An action must be prosecuted in the name of the real party in interest * * *."

STATEMENT OF THE CASE.

This action was instituted by the petitioner, United Bonding Insurance Company as surety, against the respondent, Ashwood Construction Company as obligee on a performance bond wherein the Timzan Construction Company was principal. The action prayed for a declaratory judgment and joined as parties defendant the other respondents, Pete Salemi, d/b/a Central Excavating Company, Arrow Builders & Supply Company, Air Compressor & Rental Company, d/b/a A.C.R. Equipment Company, J. J. Turner Company and Arturo Construction Company, all of whom perfected mechanic's liens against the property.

The cause proceeded to trial before the Honorable Girard E. Kalbfleisch, Judge of the District Court sitting without a jury. On the 10th day of January, 1968, the Court entered judgment in favor of Ashwood Construction Company for One Hundred Thousand Three Hundred Eighty Two Dollars and Forty Two Cents ($100,382.42); in favor of Pete Salemi, d/b/a Central Excavating Company for Seventy Eight Thousand Five Hundred Seventy Three Dollars and Sixty Six Cents ($78,573.66); in favor of Arrow Builders Supply Company for Thirty Seven Thousand Five Hundred Fifty Two Dollars and Fifty Five Cents ($37,552.55); in favor of Air Compressor Rental Company for Twelve Thousand Dollars ($12,000.00); in favor of Arturo Construction Company for Five Thousand Five Hundred Seventy Seven Dollars

($5,577.00) and in favor of J. J. Turner Company for Nine Hundred Thirty Five Dollars and Sixty Three Cents ($935.63) all with interest. Motion for amendment of judgment, motion for leave to amend pleadings and motion for new trial were overruled February 7, 1968. The District Court did not rule upon the motion of United Bonding Insurance Company, petitioner herein, to dismiss Ashwood Construction Company as a party to the proceedings.

An appeal was duly taken to the United States Court of Appeals for the Sixth Circuit which on September 4, 1969, affirmed the District Court. The order affirming is set out in Appendix 3.

REASONS FOR GRANTING THE WRIT.

1. The finding of the District Court as affirmed in favor of Ashwood Construction Company is contrary to Section 2307.05 Ohio Revised Code and Rule 17 (a) of the Federal Rules of Civil Procedure that an action must be prosecuted in the name of the real party in interest.

2. The finding, as affirmed, in favor of Ashwood Construction Company, at the time in question, namely May 15, 1965, the latter then being wholly unable to meet its contractual obligations, is contrary to the Common law of the State of Ohio where the contract of suretyship was executed and where the action was tried. *Erie Railroad vs. Thompkins,* 304 U.S. 64.

3. The finding as affirmed in favor of Ashwood Construction Company permitting the Obligee, Ashwood Construction Company, to substantially alter the contract is in conflict with the announced decisions of this Court. *Prairie State Bank vs. United States,* 164 U.S. 227 and of the law of Ohio. *Brewing Company vs. Schultz,* 68 Ohio State 407.

4. The finding, as affirmed in favor of Central Excavating, Arrow Builders & Supply Company, Air Compressor Rental Company, J. J. Turner, Inc. and Arturo Construction Company is contrary to the laws of Ohio. *Cleveland Metal Roofing & Ceiling Co. vs. Gaspard,* 89 Ohio State 185; *Royal Indemnity Co. vs. The Northern Ohio Granite & Stone Co.,* 100 Ohio State 373; *Cleveland Window Glass & Door Co. vs. The National Surety Co.,* 118 Ohio State 414, *Royal Indemnity Co. vs. Day & Maddock,* 114 Ohio State 58. *Carruth vs. Standard Accident Insurance Co.,* 329 Fed. 2d 690; *Indemnity Company of North America vs. Portsmouth Ice, Coal & Building Materials,* 122 Ohio State 439.

5. The finding as affirmed in favor of Central Excavating Company is unsupported in that the negotiations never resulted in a contract, nor, did Central Excavating perform, nor was performance alleged 2A *Moore's Federal Practice* 1763.

6. The findings as affirmed gave no allowance for substantial performance of 95% of the work done nor of the right of subrogation when the surety was required to pay.

I. THE MOTION OF UNITED BONDING INSURANCE COMPANY, PETITIONER HERE, TO DISMISS ASHWOOD CONSTRUCTION COMPANY AS A PARTY IN INTEREST TO THE PROCEEDINGS SHOULD HAVE BEEN GRANTED.

On or about December 11, 1964, the Timzan Construction Company entered into a contract of construction in three phases with the Ashwood Construction Company. United Bonding Insurance Company, as surety, executed a performance bond in respect thereto in the sum of One Hundred Sixty One Thousand Dollars ($161,000.00). On

November 2, 1964, Ashwood Construction Company, being one of twelve subsidiaries, along with its parent Dover Construction Company, signed a joint and several promissory note to Commercial Discount Corporation of Chicago, Illinois in the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00). On May 7, 1965, this note was increased to Two Million Dollars ($2,000,000.00). The notes were secured by a general assignment. (Joint Exhibit 1, A-Z) page V of that document contained the following:

> "We hereby grant you a security interest in *and assign and pledge to you* all present and future accounts, chattel papers, *contract rights.* * * *" (Emphasis supplied.)

This assignment was buttressed by the Resolution of the Ashwood Construction Company dated November 2, 1964, and known in evidence as Plaintiff's Exhibit 25 which included "all things in action."

The Prudential Insurance Company entered into a loan commitment, with Ashwood Construction Company, subject to three conditions, none of which were fulfilled, for $500,000.00. The Commercial Discount Corporation served notice of the assignment to it upon Prudential (Plaintiff's Exhibit 22). Prudential construed this assignment to mean that all funds encompassed in the commitment were presumably to be delivered to Commercial Discount Corporation (R. 409-410).

By this assignment Ashwood was not the real party in interest to these proceedings. Actions must be so prosecuted. Federal Rules of Civil Procedure 17 (a). The Resolution of Ashwood Construction Company had authorized the assignment of "all things in action." Prudential Insurance Company upon whom the assignment was served and Commercial Discount Corporation, the assignee con-

strued the document as a general assignment, which in fact it was.

An action must be prosecuted in the name of the party, who, by the substantive law, has the right to enforce it. 3 *Moore's Federal Practice* 1330. This requires that the assignee prosecute the action. 3 *Moore's Federal Practice* 1334-1335 and 1339. Assignment transfers and vests in another all property rights. 5 *Ohio Jurisprudence* 2d 151. This includes intangible property rights commonly known as choses in action. 5 *Ohio Jurisprudence* 2d 152. An assignment transfers the whole of any property right and any estate or right therein. *Bouvier* 91, 6 *Corpus Juris Secundum* 1045. The proceeds of an executory contract vest immediately in the assignee. 5 *Ohio Jurisprudence* 2d 187.

Ashwood Construction Company having assigned its rights to Commercial Discount Corporation, the motion to dismiss Ashwood Construction Company should have been granted.

II. AS OF MAY 15, 1965, THE DATE OF PERFORMANCE, ASHWOOD CONSTRUCTION COMPANY WAS UNABLE TO MEET ITS FINANCIAL OBLIGATIONS. SUBSEQUENT THERETO ON AUGUST 16, 1966, IT, TOGETHER WITH DOVER CONSTRUCTION AND ALL ITS SUBSIDIARIES WAS PRECIPITATED INTO BANKRUPTCY.

On the crucial date, May 15, 1965, the Township Trustees had denied Ashwood Construction Company any further building permits on the premises (R. 509). Real estate taxes on the premises were delinquent and unpaid (R. 424-427). Ashwood Construction Company was jointly obligated on the Two Million Dollar ($2,000,000.00) note as above set forth. Its only asset was bare, naked title to the land, it having acquired title from a sister subsidiary of Dover Construction Company namely, Bolingbrook

Construction Company, by a book entry to "land" of Two Hundred Fifty Thousand Dollars ($250,000.00) and an offsetting entry to "accounts payable" Bolingbrook of the same amount. As of that date the net worth of Ashwood Construction Company was Five Thousand Thirteen Dollars and Ninety Three Cents ($5,013.93), Four Thousand Five Hundred Dollars ($4,500.00) of which was capital stock not paid in (R. 254). Additional obligations, not shown on its books and not revealed until the filing of the schedules in bankruptcy approached One Million Three Hundred Thousand Dollars ($1,300,000.00) (plaintiff's exhibits 1-19; plaintiff's exhibit 41, Bankruptcy schedules).

The commitment from Prudential Insurance Company contained three conditions, none of which were fulfilled, namely, that (1) a certificate of completion would be tendered, (2) all assessments due or to become due would be paid, (3) that a completion and subdivision bond would be provided. In any event the commitment was blocked by notice of the assignment to Commercial Discount Corporation.

The Treasurer of Ashwood Construction Company testified that it neither kept nor prepared any financial records such as profit and loss statements or a balance sheet (R. 37) or that he had any idea of its assets (R. 60), or that as of April 15, 1965, Ashwood had sufficient funds to pay phase one of the contract (R. 200) nor of any funds on deposit to the credit of Ashwood.

The surety need not perform where it is apparent and obvious that it will not be paid. Justice does not require that it settle its claim in the Court of bankruptcy. A contractor need not trust the credit of another whom he finds insolvent, even though he has agreed to do so. 6 *Williston on Contracts*, 378. To require a contractor to make expensive preparations or part performance which will be

futile if the contract is not carried out is an unreasonable hardship.

This doctrine is grounded upon the principle of anticipatory breach. One who knows, or has good reason to believe that a contract promise can not or will not be performed is excused from performance. It is significant to note that the petitioner demurred to the cross-complaint of Ashwood for the reason that the cross-petition failed to allege its ability to perform or pay.

Anticipatory breach is ground for the recision of a contract, 11 *Ohio Jurisprudence* 2d 555. If at the time fixed for performance, the promisor is insolvent, the counter promise is discharged. 11 *Ohio Jurisprudence* 555. If at the time fixed for performance, the promisor is insolvent, the counter promise is discharged. 11 *Ohio Jurisprudence* 2d 219. If Ashwood could not pay, United need not perform. Every consideration of justice requires that inability to perform should immediately excuse further performance. *Williston,* Revised Edition, Section 1315, page 3713. The doctrine of anticipatory breach is available even where performance is only apparently impossible. *Restatement of Contracts,* Section 318. By definition of the *Restatement of Contracts* Section 287, one is insolvent when he is unable to pay his debts as they mature. The rationale is further set forth in *Williston on Contracts* 3rd Edition, page 344, Section 699 to the effect that no one is compelled to do a useless act, and that a "manifestation of inability to perform has the same effect" (p. 350). The Ohio law is to the same effect, *Diem vs. Koblitz,* 49 Ohio State 41.

Ashwood being unable to perform, the contract of suretyship was discharged.

III. BY INCREASING THE BOND REQUIREMENT FROM ONE HUNDRED SIXTY ONE THOUSAND DOLLARS ($161,000.00) TO TWO HUNDRED TWENTY ONE THOUSAND DOLLARS ($221,000.00), AN INCREASE OF THIRTY SEVEN PERCENT (37%) THERE WAS A MATERIAL AND CARDINAL ALTERATION OF THE UNDERLYING OBLIGATION WHICH DISCHARGED THE SURETY.

The performance bond in question, CG-1097, was in the principal sum of One Hundred Sixty One Thousand Dollars ($161,000.00). It was stated by Mr. Lefkowitz, President of the obligee that this bond was "not accepted." If this be so there was no bond in the first instance. Sometime in March of 1965 Ashwood increased the requirements of Phase One of the project by Sixty Thousand Dollars ($60,000.00). A "rider" for that amount was prepared but never executed by the principal Timzan, Inc. Ashwood obtained a copy of this "rider" unsigned by the principal. In the pre-trial proceedings Ashwood filed a motion for summary judgment at which time the District Court ruled as follows:

> "A *recomputation* of the work to be done under one of the Timzan contracts indicates that the contract price is $221,000.00 whereas the *original* price was $161,000." (Emphasis supplied.)

The Court further observed that the rider contained the following:

> "*Now, Therefore,* in *consideration of an additional premium to be paid the Surety,* it is agreed that the penal sum in said bond shall be hereby increased by the sum of $60,000." (Emphasis supplied.)
>
> "In witness the *Principal* and Surety have hereunto set their hands." (Emphasis supplied.)

The opinion of the District Court continued:

> "Ashwood has not introduced evidence that the additional premium was paid. Moreover, although the rider bears the signature of an officer of the plaintiff, the 'Surety' there *is no signature of an officer of Timzan, the 'Principal.'*" (Emphasis supplied.)

The motion for summary judgment was thereupon denied. It is significant that with this caveat, Ashwood failed to introduce any evidence upon the trial that the *additional premium had been paid.*

It has been held that alteration, however slight will discharge the surety. The surety itself must be the sole judge whether or not it will remain liable. *Prairie State Bank vs. United States,* 164 U.S. 227. The increase of the original contract by Sixty Thousand Dollars ($60,000.00) sought to increase the obligation of suretyship by that amount, a thirty-seven percent (37%) increase. This was so material as to discharge the surety. Regardless of how trivial the alteration may be, or even if it operate to the advantage of the surety, the latter is discharged. *Reese vs. United States,* 9 Wall. 13.

Williston puts the requirement at "anything more than a mere immaterial" alteration, 4 *Williston,* Revised Ed., 3547.

Under the law of Ohio the burden rests with the obligee to prove that there was no material alteration. *Brewing Company vs. Schultz,* 68 Ohio State 407 at page 416.

> "The surety has a right to stand upon the very terms of his contract, the exact letter of his bond, and if he does not consent to any variance of it and a variation is made, such variation operates to annul his contract and to discharge him from liability."

The case continues by putting the burden of proof upon the *creditor to show that there was no material alteration of* the underlying agreement (at page 420):

> "* * * the burden is upon it to plead and prove such consent, and not upon the surety to show and prove that such failure to perform was without its consent."

To the same effect are *Stearns: Law of Suretyship,* 5th Edition, Section 6.1; *Restatement of Suretyship,* Section 128 Comment D page 342; 72 *Corpus Juris Secundum* 618; *Simpson on Suretyship* 330 citing the increase in interest rate from 4% to 5% and 50 *American Jurisprudence* 932.

IV. THE BOND IN QUESTION NOT BEING A DIRECT ACTION BOND, THE MATERIALMEN, CENTRAL, ARROW BUILDERS & SUPPLY, AIR COMPRESSOR RENTAL COMPANY, J. J. TURNER AND ARTURO CONSTRUCTION HAD NO RIGHT OF RECOVERY UPON IT. ALL MATERIALMEN WERE FULLY PROTECTED BY THE LIENS FILED BY THEM.

The finding and judgment as affirmed failed to distinguish between public liability bonds and bonds for purely private construction. Public construction bonds are covered in Ohio by Section 153 of the Ohio Revised Code where a right of direct action is given laborers and materialmen not parties to the contract. As to construction bonds of a purely private nature, as in the instant case, no direct right of action exists. The materialmen were not obligees under the bond which ran to Ashwood Construction Company.

Why is this so? For reasons of pure logic. The premium was not paid by third parties such as the materialmen. They suffered no legal detriment. Their rights are fully protected by the mechanic's lien laws of which

they took advantage. Concerning the right of third persons, not parties to the bond to recover in private construction, the law of Ohio is encompassed by the following decisions: *Cleveland Metal Roofing & Ceiling Company vs. Gaspard,* 89 Ohio State 185; *Royal Indemnity Co. vs. Northern Ohio Granite and Stone Co.,* 100 Ohio State 375 and *Cleveland Window Glass & Door vs. The National Surety Company,* 118 Ohio State 414.

In *Gaspard* the Supreme Court of Ohio held that a bond in private construction was for the protection of the owners of the building and that an action on the bond can not be maintained for labor and materials. It was held that laborers and materialmen could not sue and recover on the bond. The covenant in the bond in *Gaspard* was similar if not identical to the covenant in the instant bond.

Royal Indemnity Co. vs. Northern Ohio Granite & Stone Company, 100 Ohio State 375 "overruled" *Gaspard* as to public construction contracts. *Royal Indemnity* was a contract for public construction. The Court held at page 377:

> "While under our statute our mechanic's lien law may not have provided for liens of this particular structure, because of its *public nature,* the city, in this case, knowing that fact, may have had in contemplation the protection of mechanic's and materialmen, who could *not obtain a valid lien upon this structure.*" (Emphasis supplied.)

This is the distinction. In public construction claimants are denied the right of a mechanic's lien whereas in private construction they are not. Accordingly they are given a right of direct action on the *bond* in *public construction only.* This right is now preserved in Section 153 et sequel of the Ohio Revised Code.

All doubt as to private construction was resolved in *Cleveland Window Glass & Door vs. The National Surety Company*, 118 Ohio State 414. The issue therein presented was whether or not the rule announced in *Royal Indemnity* as to public construction should be extended to *purely private construction*. The Court held that the rule of *Royal Indemnity* should not be so extended.

The Ohio Supreme Court in *Cleveland Window Glass* clearly distinguished between the two situations at page 420 of the opinion:

> "Another very clear distinction between the *Royal Indemnity* case and the instant case is that the former involved a *public contract*, in which neither the *materialmen nor laborers could be afforded the protection of a lien.*" (Emphasis supplied.)

Cleveland Window Glass disposes of the claimed right of third parties such as materialmen to rely upon the bond at page 417 of the opinion:

> "The plaintiff asserts that before it contracted to furnish material and labor to the Wade Chateau Company it had knowledge of the execution of said bond, and *relied thereon*. It asserts that under the terms and conditions of such bond the National Surety Company became bound to pay plaintiff's claim upon the failure of the Wade Chateau Company so to do." (Emphasis supplied.)

The surety demurred to the petition and that demurrer was sustained. The Supreme Court of Ohio affirmed the opinion of the Court of Appeals, Eighth Judicial District of Ohio, reported in 21 Ohio Appeals 65. The opinion in the Court of Appeals sets forth the rationale. From page 71 of the opinion:

> "What was the intention of the parties, deducible from the provisions of the bond, especially the obliga-

tions of the bond? No matter what the terms of the deed of trust are, the ground for recovery, the existence of legal liability, must be imbedded in the terms of the bond. There is such a vast difference between the claim that it runs to both the bondholders and the lienholders, and the claim that it runs to the bondholders alone, that it must be assumed that this striking fact, involving not only the question of *financial responsibility,* but of *premium payments* as well, was just as patent, important, and obvious *prior to the execution of the instrument,* and during its drafting, as at the present time, and, if so, is it *unreasonable to assume that if the former was their* intent the parties to the bond would not have drawn upon a wealth of language to incorporate in the bond those words, phrases and clauses which *would specifically include lienholders* as well as bondholders, or which, by their employment, would specifically provide that the contract or obligation was for the benefit of third parties not actual parties to the contract? * * * If the bond was to run to lienholders as well as bondholders, it is only *simple logic to say that language of such import would have been employed.* But there is no word of this nature expressly stated in the bond, and this *absence can only mean that it was not the intention of the parties to have the bond run to both the bondholders and the lienholders.* The bond distinctly runs to the bondholders, and to insert lienholders as well, without express or implied authority, is the *executing of a new and additional obligation* on the part of the *surety company, not warranted by any construction of* which the language *is capable.* If the contrary were the intention, the conclusion is *inevitable that the insurance company* would have *inserted a clause including lienholders,* and would thus *have secured an additional premium, and the principal of the bond would have insisted upon the employment of such a clause as a matter of self-preservation.* This situation applies to the Guardian

> Savings & Trust Company, as well as to the Wade Chateau Company. Language is not *ambiguous* that *needs no explanation.* The terms of the bond run to the bondholders alone, because the bond ends with that mission, and it employs no language whatever, directly or indirectly, that includes anything or anybody but the bondholders; when the *obligation ends with bondholders, then the* clause is left without *doubt, shorn of uncertainty, and* there *is, therefore, no ambiguity, and no need of resort to the rules of construction.* The doubt must arise from the language, *not from the invention of the mind.* The uncertainty must *sound from within the language, not from without.*" (Emphasis supplied.)

The Supreme Court of Ohio disposes of the contention urged by *Royal Indemnity* at page 419 of the opinion:

> "Upon the authority of the decision of this court in Royal Indemnity Co. v. Northern Ohio Granite & Stone Co., 100 Ohio St., 373, 126 N.E., 405, 12 A.L.R., 378, it is sought *to hold this bond liable for material and labor which went into the construction of said building not satisfied from the proceeds of the sale of the leasehold,* which was sold subject to the bonded indebtedness. *To so hold would be to extend the principle announced in the Royal Indemnity case, supra, which we are not disposed to do.*" (Emphasis supplied.)

In commenting upon the reason for the rule in *Royal Indemnity,* the Supreme Court of Ohio quoted in *Cleveland Window Glass* at page 420 from *Royal Indemnity*:

> "While under our statute our mechanic's lien law may not have provided for liens on this particular structure, because of its public nature, the city in this case (Royal Indemnity) knowing that fact, may have had in contemplation the protection of mechanics and materialmen who could not obtain a valid lien upon this structure." (Parenthesis supplied.)

The Court concludes on pages 420 and 421 that the remedy of the materialmen was in the filing of liens, which they did as in the instant case, although in *Cleveland Window Glass,* the interest of the principal was insufficient to pay their claim in full.

The finding as to Air Compressor Rental is clearly contrary to the decision of the Supreme Court of Ohio. The claim of Air Compressor Rental is to the effect that it rented certain equipment to Timzan. Whereas, the evidence more clearly showed a sale of the same. Air Compressor Rental was not entitled to recover on the bond for the reason that it could not file a valid lien. In *Royal Indemnity vs. Day and Maddock,* 114 Ohio State 58, the Supreme Court of Ohio held adversely to Air Compressor Rental. The force of the opinion is even greater when it is considered that the construction in *Day and Maddock* was public and not private. The syllabus, which in Ohio is the law of the case, is as follows:

> "1) The surety on a bond executed by a contractor for the construction of a public building, in conformity to the requirements of Sections 2365-1, 2365-2 and 2365-4, General Code, *does not thereby obligate himself to pay the rental, contracted to be paid by the principal in the bond for the use of a concrete mixer, hoisting engine, or other machinery used as appliances, or part of the equipment to facilitate the performance by the contractor of his contract, nor does he obligate himself for any other expense incident to such rental use.*" (Emphasis supplied.)

The theory of recovery in a proper case, is set forth on page 66 in a quotation from *Massachusetts Bonding Co. v. Chouteau Trust,* 264 Fed. 793:

> "The contractor's bond in question is provided, in the scheme of public improvement of the city, to take the place of the statutory liens of laborers and materialmen under the lien laws of the state."

A recent Federal case decided under the Ohio law denies Air Compressor the right to recover upon equipment rentals. *Carruth vs. Standard Accident Insurance Co.*, 329 Fed. 2d 690; 5th C.C.A. (1964) was a suit by an equipment rental company under a bond, the pertinent provisions of which are as follows:

> "* * * the parties hereto agree that this undertaking shall be for the use and benefit of all *creditors* having just claims incurred by the principal for labor performed upon and for *materials or services* furnished for the work specified in said sub-contract, whether lienable or otherwise and this bond may be sued upon by them as if executed to them in proper person, as well as for the obligee. If the principal shall promptly *make payment to all persons supplying labor and material in the prosecution of the work* provided for in said subcontract * * * then this obligation to be void." (Emphasis supplied.)

One could hardly conceive language more favorable to the supplier of equipment. Nevertheless the Court held to the Ohio rule as announced in *Royal Indemnity Co. vs. Day and Maddock*, 114 Ohio State 58, cited at the bottom of page 691 and denied recovery to the lessor of equipment. The Court also cited and relied upon *Cincinnati Quarries Co. vs. Hess*, 28 Ohio Appeals 340.

36 *Ohio Jurisprudence* 2d 487 Mechanic's Liens, is as follows:

> Sec. 51 Tools and Appliances.
>
> "While mechanic's liens may be had for materials and machinery furnished for the purposes enumerated in the statute, the rule is otherwise as to tools and appliances *used only* temporarily during the process of construction." (Emphasis supplied.)

The true import of the language "machinery" used in the statute 1311 O.R.C., et sequel, is that machinery which is incorporated into the land itself as a fixture,

which, of course, was not the case here. Those used "temporarily in the process of construction" do not create lien rights in the owner-lessor thereof.

The Supreme Court of Ohio seems to have decided the very issue here in contest. That Court ruled per curiam in *Indemnity Co. of North America vs. The Portsmouth Ice, Coal & Building Material Co.*, 122 Ohio State 439 as follows at page 441:

> "Material may be carried to a place on a structure by a hodcarrier, and when carried to the proper place upon the building, it may be placed in position by the use of a trowel by the mason building the wall. The labor of the hodcarrier and the labor of the mason are expended in the completion of the structure, and inseparably incorporated therein; but neither the hod nor the trowel forms any part of the structure. An engine with its attachment of block and tackle may hoist most of the material of a structure into place and hold it there until it is made fast by other appliances. In the doing of this class of work on steel structures, most of the steel is hoisted into place by the engine with its block and tackle, and is then bolted to hold it in place until the final riveting process is gone through with. After that the bolts are removed to be used on other metal parts of the building, and may be used later in many steel structure buildings. The engine *with its hoisting tackle*, and the bolts used temporarily as stated, form no part of the building." (Emphasis supplied.)

None of the suppliers of materials had the right to recover on the bond under the decisional law of Ohio. This is particularly true of Air Compressor Rental which only rented and/or sold equipment for use on the premises.

Arturo Construction Company never entered an appearance and never filed a responsive pleading. It is not entitled to recover.

V. THE NEGOTIATIONS BETWEEN UNITED AND CENTRAL EXCAVATING NEVER RIPENED INTO A CONTRACT. CENTRAL PROCEEDED AS A VOLUNTEER. IN ANY EVENT IT FAILED TO PERFORM THE NECESSARY CONDITIONS PRECEDENT ENTITLING IT TO PAYMENT.

Central Excavating was originally a sub-contractor of Timzan, the general contractor. In its cross-petition it asserts that it did "certain work" in furtherance of the project. Numerous rough drafts of a proposed contract passed between the parties (Central's Exhibits D and E) none of which were ever executed. Page four (4) of the Cross-Petition filed by Central provided:

> "* * * the said United Bonding Insurance Company entered into an oral contract with this answering defendant employing your answering defendant to complete the installation of storm and sanitary sewers, the installation of water mains, curbs and roads in said Phase One of the *original contract between Timzan, Inc. and Ashwood Construction Company.*" (Emphasis supplied.)

The underlying contract between Timzan and Ashwood contained the following provisions:

> "* * * any additions or revisions as required by the County of Cuyahoga (the governing authority of Olmsted Falls) * * * and the latest detailed standard specifications for constructing water mains and appurtenances of the City of Cleveland." (Parenthesis ours.)

Central showed that it did "certain work." It did not show that it was according to the specifications set forth in the underlying contract as above set forth, or that it was according to the specifications of any governmental body. Of what utility is its "work" if it fails to pass in-

spection. Central's Cross-Petition did not allege performance of its obligations under the "contract." Under Rule 12 h (1) of the Federal Rules of Civil Procedure the defense of failure to state a claim is not waived. In 2 *Moore's Federal Practice* 1763 it is stated that the pleader *must* state that he has performed his obligations under the contract.

On May 19, 1965, Central claimed Twenty One Thousand Dollars ($21,000.00) due and unless that amount were paid, it would do no further work. No payment was forthcoming and what Central did thereafter, it did only as a volunteer.

On March 22, 1965, Central addressed a letter to United (joint exhibit 40) stating that Central was ready, willing and able to furnish the necessary labor, material and equipment to *complete Phase One of the Timzan, Inc. contract with Ashwood.* This clearly incorporated the Timzan agreement with Ashwood into the offer. The proposal continued by stating that Central would submit monthly estimates to the engineer for approval before payment. This was never done. The proposal continued by stating that if certain advances were made, Central in turn would reimburse suppliers of materials through March 19, 1965. United issued two checks, one for Fifteen Thousand Dollars ($15,000.00) and one for Twelve Thousand Dollars ($12,000.00) (Central's Exhibits U and V). Central accepted and cashed these checks but *never* fulfilled the conditions of payment to suppliers. If there was a contract between United and Central that agreement was breached by non payment over to the suppliers.

The testimony reveals that counsel for Central had full authority to deal in this matter. The letter of May 19, 1965 (United's Exhibit 40) states the claim to be

Twenty One Thousand Seventy Two Dollars and Fifty Two Cents ($21,072.52) and that unless this amount be paid, no further work would be done. Central can recover no more than this amount, if indeed, it can recover at all.

VI. THE CONTRACT IN QUESTION WAS NINETY FIVE PER CENT (95%) COMPLETE. THIS AMOUNTS TO SUBSTANTIAL PERFORMANCE TO WHICH THE SURETY WAS ENTITLED TO PAYMENT QUANTUM MERUIT. FURTHER, THE SURETY WAS COMPELLED TO PAY THE CLAIMS OF ALL SUB-CONTRACTORS WITHOUT SUBROGATION.

The owner of Central Excavating Company testified that when it stopped work the contract, Phase One was ninety five percent (95%) complete. Ashwood never objected to this performance in any respect. This amounted to substantial performance for which the Surety should receive credit. Ashwood received this benefit, was compelled to pay nothing at any stage, and has been unjustly enriched. At least, if the surety is now compelled to pay the claims of subcontracts amounting to One Hundred Thirty Four Thousand Six Hundred Thirty Eight Dollars and Eighty Four Cents ($134,638.84) with interest, it, the surety, should be subrogated to their respective mechanic's liens in that amount. Otherwise Ashwood will receive ninety five percent (95%) performance and be compelled to pay nothing.

Arant on Suretyship, page 357, Section 79 states that it is universally recognized that the surety upon paying the creditor is entitled to be substituted to the creditor's position. The surety is treated as the assignee of the creditor. *Simpson on Suretyship,* page 206, and is entitled to all priorities enjoyed by the creditor. If the claims of subcontractors and materialmen are to be paid, the surety should take their mechanic's liens by assignment. *Stearns*:

Law of Suretyship 5th Ed. page 448, Section 11.4. This transfer is accomplished by operation of law, *Stearns*, page 439, and rests upon the principle of natural justice. Subrogation results by operation of law independent of contract. 50 *Ohio Jurisprudence* 2d 378, Section 3, and was expressly so held in *Maryland Casualty Co. vs. Gough*, 146 Ohio State 305. See also 50 *Ohio Jurisprudence* 2d 392, Section 14; *Restatement of Restitution*, Section 162; 50 *American Jurisprudence* 679 and 752 and 83 *Corpus Juris Secundum* 575, 611 and 699.

As to the right of subrogation of the surety in retained percentage of the contract it has been held that when a surety meets its obligation on its contract bond by paying the claims of laborers and materialmen, it subrogates to whatever rights the laborers and materialmen had in the retained fund to the extent necessary to reimburse it. *Western Casualty & Surety Co. vs. Brooks*, 362 Fed. 2d 486 citing *Pearlman vs. Reliance Insurance Co.*, 371 U.S. 132 at page 389.

One who substantially performs a building contract is entitled to payment, 11 *Ohio Jurisprudence* 2d 489; *Ohio Farmers Insurance Co. vs. Cochran*, 104 O.S. 427; 3 *Corbin on Contracts* 764, Section 701. Where breach goes only to part of the consideration, the plaintiff may recover in spite of the breach, 6 *Williston* 3rd Ed. 155. It is deemed "equitable to require the former to pay for what he gets," 13 *American Jurisprudence* 2d 44, Section 41.

Ashwood should be compelled to pay by set off or otherwise for the performance received. If the petitioner as surety be compelled to pay the claims of the subcontractors and materialmen, it should be entitled to the assignment of their liens. The latter will operate as no injustice to Ashwood, as all the liens were bounded by another surety.

CONCLUSION.

The propositions which the petitioner urges in this Petition are settled principles of suretyship as announced in Ohio and elsewhere. The federal question is found in the failure to apply the settled law of Ohio under the *Erie* doctrine. If the judgment below be permitted to stand, Ashwood, the obligee, although wholly unable to meet its contractual obligations, will be entitled to full performance, for which the Surety will receive nothing. To compel the surety to pay the claims of subcontractors and materialmen without the right of subrogation clearly enriches Ashwood unjustly. The manifest injustice is apparent. On these grounds we urge that the Petition be granted.

Respectfully submitted,

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APPENDIX 1.

CONCLUSIONS OF LAW OF TRIAL COURT.

(Filed December 20, 1967.)

In the instant case there are two main areas of conflict which are separate in themselves and which must be resolved by the Court in order to determine the rights of the parties in this case. The first area of conflict pertains to the dispute between United and Ashwood. The second pertains to the dispute between United and the various defendant subcontractors who provided materials and performed work at Brentwood for Timzan prior to April 1, 1965, and for United subsequent to the takeover agreement of said date.

For purposes of clarification and convenience, the Court will deal with and discuss these areas of conflict separately, even though they are interwoven to a great extent. The conflict between United and the defendant subcontractors of Timzan will be analyzed first.

There is clear and convincing evidence that the following defendants (who have counterclaimed against United in this declaratory judgment action) performed work services for Timzan and United at Brentwood for the respective amounts:

Central Excavating	$78,573.66
Arrow Builders Supply Co.	37,552.55
Air Compressor Rental Co.	12,000.00
Arturo Construction Co.	5,577.20
J. J. Turner, Inc.	935.63

These defendants each contend that United is obligated under its performance bonds to pay for services rendered at Brentwood prior to April 1, 1965, and that United is also obligated under the takeover agreement to pay for all services performed at Brentwood subsequent

to April 1, 1965. The evidence clearly establishes that United, by the terms of its bonds, did agree to "pay all persons who have contracts directly with the Principal [Timzan] for labor and materials." The evidence also clearly establishes that, pursuant to the takeover agreement, United did request the defendant subcontractors to continue to deliver materials and/or to perform services at Brentwood.

United has taken the position that it is not obligated, in any manner, to the various subcontractors who performed work and services at Brentwood. In support of this position, United has offered several legal conclusions which the Court now considers.

First, United argues that an unauthorized increase to one of the performance bonds, specifically the $60,000.00 rider to Bond No. CG-1097, effects a discharge of United from any liability under all of United's bonds. The Court will consider this particular question at greater length while analyzing the conflict between Ashwood and United, but suffice it to say at this juncture that the evidence of the case clearly indicates that Bond No. CG-1097 was increased in amount with United's approval and authorization and that United is estopped to deny the legal efficacy of the increase in bond coverage. The increase in bond coverage was authorized and is not a valid defense as against the defendant subcontractors who now seek recovery under the bonds.

Second, United contends that it escapes liability on its bonds since the defendant subcontractors who performed work at Brentwood perfected liens against Brentwood. United reasons that since the subcontractors of Timzan and United filed liens "for the full amount of the claims," such liens "served as full and adequate remedies at law." Even though United displays an inventive talent by

asserting such a premise, the premise is completely unsupported by law. If the courts were to adopt such reasoning, the purpose of a performance bond as supplied by a surety would be completely nullified. Ashwood's contracts with Timzan required Timzan to obtain a "100% performance bond" for the purpose of avoiding the possibility that unpaid subcontractors of Timzan would be required to perfect mechanics' liens upon Brentwood, thereby encumbering the property. United's contention in this respect is without merit.

As an additional defense to the various claims of the subcontractors, United maintains that no recovery can be had by the subcontractors either under the bonds or subsequent takeover agreement since there was a failure by certain of the subcontractors to obtain "inspection by the Cuyahoga County Sanitary Engineer as required by Section 711.101 of the Ohio Revised Code." The Court considers this contention to be irrelevant and without merit. No evidence was introduced at trial showing such "inspection" to be a condition precedent to the payment of the subcontractors.

Another of United's unique defenses against the defendant subcontractors is that the subcontractors who have counter-claimed have no right of direct action on the bonds since "only on public construction where the right is statutory is there a direct right of action on the behalf of laborers or materialmen." The Court considers United's contention as not well taken for the reasons which follow.

Each contract between Ashwood and Timzan specifically provided that "The Contractor [Timzan] shall furnish an acceptable surety bond * * * for the faithful performance of * * * this contract and for payment of all persons performing labor and furnishing materials in connection with this contract."

The law is well settled that "a surety * * * which by its contract, assures the faithful performance thereof by a principal * * * is liable to a materialman who furnishes material, in default of the principal's payment therefor." *Indemnity Co. v. Granite Co.*, 100 Ohio St. 373, syllabus 2 (1919). All subcontractors who rendered services and/or provided materials for Timzan were covered by the provisions of United's bonds and can maintain a direct action against United on such bonds. See also 11 O. Jur. 2d, Contractors' Bonds § 4, p. 186.

United interposes the baseless defense that the subcontractors cannot recover under the United bonds because "Ashwood, being unable to maintain against them, a fortiori, no other party can." The Court is not convinced that United correctly states the law even if the assumption is made that Ashwood cannot maintain an action against United upon the bonds. The correct principle of law is that the rights of laborers and materialmen to recover against a surety on a bond given by a contractor cannot be defeated by any act or omission of the obligee (Ashwood), which act or omission is not authorized or participated in by said laborers or materialmen. This principle holds even if the conduct or default by the obligee is such as to release the surety from liability to the obligee. See 11 O. Jur. 2d, Contractors' Bonds, § 8, pp. 191-2.

Apparently as an afterthought, United in its post-trial brief also argues that the defendant subcontractors are estopped by the statute of frauds from recovering for any work performed or materials provided at Brentwood subsequent to the takeover agreement of April 1, 1965. In the course of trial no evidence was introduced by any party which would support the contention that the statute of frauds is applicable to the instant case.

The Court considers the defenses offered by United

as against the defendant subcontractors to be without merit. Accordingly, it is the Court's conclusion that the defendant subcontractors shall recover for the amounts of their respective counterclaims.

The Court now turns to the area of conflict existing between United and Ashwood. Basically, the respective positions of the parties can be summarized as follows:

Pursuant to 28 U.S.C.A., Section 2201, United seeks a declaratory judgment relieving it of any and all liability under its performance bonds and subsequent takeover agreement. United advances two main reasons why the Court should make such a declaration:

> (a) There was an unauthorized material increase of United Bond No. CG-1097 which completely discharges United from any obligation upon its bonds;
>
> (b) At the time of the performance by Timzan on its contracts with Ashwood, Ashwood was "wholly insolvent and void of assets" so that "Ashwood Construction Company has no right to recover on either the underlying contract with Timzan Inc. or against United Bonding Insurance Company on the bond."

Ashwood has filed a counterclaim against United wherein it seeks to have the Court declare that United "wilfully and maliciously" breached its obligations to Ashwood under its bonds and subsequent takeover agreement. Further, Ashwood desires a declaration that it be permitted to recover "all damages proximately resulting from such repudiation or abandonment." Ashwood claims that the damages proximately resulting from such breach include:

(a) the net deficit between the cost of the Timzan contracts and Ashwood's estimate of cost of completion	$74,412.44
(b) the Price Bros. mechanic's lien paid by Ashwood	47,761.92

(c) the loan service fee incurred by Ashwood for the failure to take the Prudential loan commitment	19,312.50
(d) lost profits at Brentwood	584,200.00
(e) punitive damages	500,000.00

In order to resolve the Ashwood and United dispute, the Court must first of all consider whether or not United is correct in its contention that considering all events which culminated in this lawsuit United is completely free of liability. If the Court finds United's position is proper, then nothing further need be decided. But if the Court finds United cannot escape liability to Ashwood, it then must determine whether or not each of the aforesaid elements of damages claimed by Ashwood is proper.

Upon recalling the particular manner in which this case was tried, the Court is forced to observe the unrealistic points of view which the opposing parties, Ashwood and United, have assumed. On the one hand, United unequivocally asserts it is innocent of all wrongdoing in the events which transpired at Brentwood. On the other hand, Ashwood makes the impassioned plea that "because of the magnitude of [United's] acts and the flagrance of its wrongdoing" United must compensate Ashwood for breach of contract damages, lost profits, punitive damages, and attorney's fees. Counsel for both Ashwood and United appear to have abdicated their traditional role of offering information and cool analysis and have substituted in place thereof narrow, unsupported conclusions of law.

In support of its contention that it has no liability to Ashwood in the instant case, United has proffered a multitude of arguments and conclusions which it characterizes as complete defenses to any claim made against it by Ashwood.

United first contends that Ashwood's unauthorized raising of the amount of United Bond No. CG-1097 discharges United from any and all liability on the United bonds. Tangentially to that contention, United has injected numerous side issues which it claims lend support to its basic contention. For example, with respect to the increase of Bond No. CG-1097, United maintains that:

> (a) even though Donaldson of United testified that the rider to Bond No. CG-1097 was executed and a certified copy thereof was delivered to Ashwood, Ashwood still failed to prove:
>
> (i) the rider was executed;
>
> (ii) the rider was signed by the principal Timzan; and
>
> (iii) the premium on the rider was paid by Timzan.

Rarely has the Court seen a more perfect example of the doctrine of estoppel than applies to the situation of United's attempting to claim that the rider to Bond No. CG-1097 was unauthorized. The evidence clearly supports not only the fact that United did execute a rider to United Bond No. CG-1097 but also that United notified Ashwood of the execution of such rider with the express intention of inducing Ashwood to rely thereon. United errs in its contention that it was incumbent upon Ashwood to prove that the rider was executed; that the rider was signed by Timzan; and that the premium for the rider was paid by Timzan. United is estopped to deny that such did occur when by its own representations it led Ashwood to believe that such events had occurred. United's argument that it escapes liability on its bonds due to the alleged unauthorized increase of a bond amount is without merit.

United's second defense to Ashwood's counterclaim for damages is that Ashwood was insolvent and void of

assets and could not have paid Timzan under its contracts with Timzan even if such contracts had been fully performed by Timzan. United stresses that this defense is available because the doctrine of anticipatory breach of contract applies to the fact situation in the instant case. As stated in United's post-trial brief, at page IV-1:

> "* * * where it is apparent that when the time for performance shall have arrived, the promisor will not be in position to perform, the one whose obligation it is to proceed is relieved from performance. Applying this general statement to the parties, when it became obvious that ASHWOOD was not in financial position to pay when the performance was completed, UNITED was relieved from a tender of performance."

After a review of the evidence presented in this case by both United and Ashwood, the Court is convinced that a doctrine of anticipatory breach or anticipated failure of consideration cannot be relied upon by United as a defense to Ashwood's counterclaim. The Court bases its position on two grounds. First, United failed to introduce any evidence to support its contention that Ashwood would have been unable to pay Timzan or United after their completion of the Brentwood improvements. In fact, the existence of the loan commitment from Prudential creates a strong presumption that Ashwood would have paid Timzan or United had their work at Brentwood been completed. There is no relevant evidence to support United's assertion in its post-trial brief that "the proof is abundantly clear that Ashwood was hopelessly insolvent at the period in question, namely, May, 1965."

Second, even if United had proved that Ashwood's credit had become impaired "at the period in question, namely, May, 1965," which the Court deems that it did not, United still failed to offer any proof that either Timzan or United withdrew or refused to perform their obli-

gations because they were aware of such credit impairment at the time of the breach. The doctrine of anticipatory breach is so termed because at the time one contracting party breaches, he *anticipates* failure of the other contracting party to perform. The evidence in the case demonstrates that at the time of breach United did not have in mind a credit impairment or alleged insolvency of Ashwood and that any thoughts of such a defense arose only after the filing by Dover of a petition for reorganization under Chapter XI of the Bankruptcy Act in August of 1966.

Repeatedly during the trial and in its post-trial brief United characterized the assignment from Ashwood to Commercial Discount (Joint Ex. 1) and the notice thereof (United's Ex. 22), sent to Prudential by Commercial Discount, as destroying the effectiveness of the loan commitment to Ashwood by Prudential. The Court cannot concur with United's conclusion regarding the effect of the assignment. The assignment relates only to funds and proceeds arising out of loan closings incident to the eventual sale of homes in Brentwood and is irrelevant to the issues in this case. The testimony of Joseph R. Alvaro, resident attorney for Prudential, was that (a) the Prudential loan commitment remained in full force and effect until October 12, 1965, when it expired because the Brentwood improvements had not been completed; and (b) any assignment from Ashwood to Commercial Discount did not affect the commitment.

In its post-trial brief United also contends that United has no obligation to Ashwood under the takeover agreement of April 1, 1965, due to the fact that the takeover agreement is not supported by sufficient consideration. United offered no proof in support of such a contention at trial, and the contention is without basis or merit. The

April 1, 1965 takeover agreement's provisions recite sufficient and adequate consideration. Additionally, since the completion of a contract under default is a remedy accorded to the surety, the exercise of that remedy does not effect the surety's liability on the bond; and United, by entering into a takeover agreement, was not engaged in an independent contract so as to be released from its obligations under the bond. See Couch on Insurance 2d, Vol. 13, § 47:135, page 361.

United having failed to support its proposition that it is completely without liability to Ashwood on its counterclaim, the next issue to which the Court's attention must be directed is the amount of damages sustained by Ashwood as a result of United's breach.

United is bound under the terms of its bonds to "fully indemnify and save harmless the Obligee [Ashwood] from all cost and damage which the Obligee may suffer by reason of failure [to perform]," and is further bound to "fully reimburse and repay the Obligee all outlay and expense which the Obligee may incur in making good any such default * * *." Applying the above language of the bond to the proof, it is the Court's determination that Ashwood is entitled to recover on its counterclaim the total amount of actual and proximate damages suffered by Ashwood as a result of United's failure to honor its bonds and its breach of the April 1, 1965, takeover agreement.

In its post-trial brief United contends that Ashwood failed to properly mitigate its damages subsequent to United's breach. The evidence does not support such a contention, therefore this asserted defense is without substance or merit.

In attempting to determine the actual amount of damages Ashwood has suffered as a result of United's breach, the Court has scrutinized each element which Ash-

wood states it has proved in order to arrive at a total damage amount. The Court will analyze each damage claim which Ashwood makes in order to determine the propriety of Ashwood's total damages.

Ashwood first claims that it is entitled to recover the difference between the contract price of the Ashwood-Timzan contracts and the actual cost to complete such contracts. The estimated cost of the Ashwood-Timzan contracts is $311,000.00. Ashwood contends that the actual cost to complete such contracts is $385,412.44, and that Ashwood is entitled to recover the difference between such figures, or $74,412.44.

This Court recognizes the basic rule of damages in a contract action as stated by Williston on Contracts, Rev'd. Ed., Vol. 5, § 1363, page 3825:

> "Where the contractor fails to keep his agreement, the measure of the employer's damages, whether sought in an independent action or by recoupment or counterclaim, is always the sum which will put him in as good a position as if the contract had been performed. If the defect is remedial from a practical standpoint, recovery generally will be based on the market price of completing or correcting the performance, and this will generally be shown by the cost of getting work done or completed by another person."

In order to arrive at Ashwood's figure of $385,412.44 which it claims represents the actual cost of completion of the Ashwood-Timzan contracts, Ashwood includes amounts which represent salaries, travel and lodging expenses, air line ticket expenses, car rental bills, etc., incurred by numerous Ashwood and Dover executives and employees. Ashwood characterizes these items as "extra expenses and salaries" incurred as a result of Timzan's and United's breach and theorizes that such expenses would

not have been incurred by Ashwood had not the breach occurred. The Court does not consider such items to be properly includable in any figure representing the total cost of completion of the Ashwood-Timzan contracts. The salaries and expenses of Ashwood's and Dover's employees had to be paid by Dover regardless of the particular project of Dover and its subsidiaries which such employees happened to be concerned with and working on. These expenses for salaries, travel, and lodging cannot be charged to United as "expense which the Obligee [Ashwood] may incur in making good any such default."

United is liable for only those damages which were a natural and proximate result of United's breach, and the Court does not consider the salaries and expenses of Ashwood's and Dover's executives to be a proximate consequence of United's breach.

Included in the total of $385,412.44, which Ashwood claims represents the cost of completion of the Timzan contracts, is the $146,047.00 estimate of Engineer Kabbes covering additional work necessary to comply with the terms of the original Timzan contract. It should be remembered that the $146,047.00 figure is only an estimate, as was also the Timzan contract price of $311,000.00. In the spring of 1966 Ashwood disposed of a substantial portion of the property involved. Upon the evidence in this case, the Court concludes that the damage claim based on an estimated contract price and an estimated cost of completion is too speculative and not sufficiently definite to be accepted as a proper element of damage.

However, Ashwood is entitled to recover for certain other damages which were a proximate result of United's breach.

Timzan's and United's failure to fulfill their obliga-

tions at Brentwood by the specified date proximately resulted in Ashwood's damage in the sum of $19,312.50 representing the service or penalty fee of the Prudential commitment.

As the result of United's failure to honor its bonds and to pay Timzan's subcontractors, Ashwood is entitled to recover $7,958.00 in order to discharge the lien perfected against Brentwood by Empire Excavating Company who performed work and services at Brentwood for Timzan but who failed to appear as a party in this lawsuit.

Ashwood also is entitled to be reimbursed for the amount of $47,761.92 which was paid to Price Bros. in settlement of its lien filed upon Brentwood. It is generally held that "an owner is entitled to recover from a contractor or the surety on the contractor's bond, the amount paid or agreed to be paid by the owner to third persons, in order to avoid a mechanic's lien for labor or material furnished the contractor." See annotation "Owner's right to recover from contractor or surety on his bond amount paid or agreed to be paid by former to third person, in order to avoid mechanics' liens for labor or material furnished to contractor." 134 A.L.R. 314.

With regard to the remaining liens, all lienholders have counterclaimed in the instant suit and, as explained hereinbefore, can recover against United for the respective amounts of such liens. Since these lienholders are entitled to direct judgments against United, the amounts of such liens are not properly includable in any damage award granted to Ashwood.

Ashwood is entitled to recover as a proper damage claim the amount of $7,200.00, which is the bond premium of Progressive Mutual Insurance Company. The bond secured from Progressive Mutual indemnified Women's Federal and Lawyers Title Insurance Company from any loss

which would arise to them by reason of mechanics' liens filed against Brentwood. Had United honored its bonds, the various liens would not have been filed and the necessity for such a bond would not have arisen.

Ashwood is entitled to recover as a proper damage claim the amount of $15,750.00 which was paid to Women's Federal for loan and appraisal fees. If Timzan had performed its contracts with Ashwood as agreed, Ashwood would not have had to seek additional financing which would include release of periodic payments as work progressed at Brentwood; and if Ashwood had not been forced to seek the additional financing due to Timzan's and United's breach, the expense of $2,400.00 for title and escrow fees paid to Lawyers Title Insurance Company would not have been incurred by Ashwood. Consequently the $15,750.00 and $2,400.00, for a total of $18,150.00, were damages suffered by Ashwood as a proximate and direct result of United's and Timzan's breach.

The Court has for consideration the question of whether or not Ashwood can successfully recover, as allowable damages proximately resulting from United's breach, profits lost by Ashwood due to its alleged inability to build and sell homes at Brentwood. Basically, Ashwood's contention regarding its claim for lost profits can be stated as follows:

> (a) prior to the letting of contracts for any improvements at Brentwood, Ashwood solicited prospective purchasers of new homes to be constructed at Brentwood;
>
> (b) response was favorable, and contracts relating to underground improvements at Brentwood were entered into with Timzan;
>
> (c) Ashwood entered into purchase agreements with 82 prospective home purchasers at Brentwood;

(d) the estimated profit Ashwood would have received on each home built at Brentwood would have been $2,300.00;

(e) due to Timzan's and United's failure to complete the underground improvements at Brentwood, homes could not be built at Brentwood and no profits on the sale of such homes could be realized;

(f) Ashwood also would have constructed and sold homes on all remaining sublots at Brentwood, the estimated profit on the sale of each home also being $2,300.00;

(g) Ashwood is entitled to recover $2,300.00 for each of the 82 homes contracted for, or the total sum of $188,600.00;

(h) Ashwood is entitled to recover $2,300.00 for each of the remaining 172 sublots on which homes would have been constructed, or a total of $395,600.00.

In support of its above-stated position, Ashwood relies almost exclusively on the case of *Gilmore v. Cohen*, 95 Ariz. 34, 386 P.2d 81, 11 A.L.R. 3d 714 (1963). There the plaintiffs were given options to buy, at stated prices, thirteen parcels of land belonging to the defendants. Six of these parcels had changed hands when the defendant refused to make further sales. Plaintiffs instituted suit and the issue of damages arose. The plaintiffs sought to recover lost profits resulting from the breach since they had built homes on the six parcels which had changed hands and had sold them for substantial profits. Plaintiffs contended that like profits would have been realized on the remaining tracts if they had gained possession of the parcels and built homes thereon. The Supreme Court of the State of Arizona limited plaintiffs' recovery to nominal damages, however, holding that the plaintiffs failed to establish with the requisite degree of certainty

what their actual profits would have been on the remaining parcels.

In spite of the fact that the above case held against the plaintiffs who sought to recover lost profits, Ashwood stresses that *Gilmore v. Cohen, supra*, sets forth guidelines and standards by which lost profits can be recovered. Ashwood argues that the court in *Gilmore* awarded only nominal damages since "the amount of plaintiffs' damages could not be ascertained from the evidence with any degree of reasonable certainty." Ashwood also argues that its evidence relating to lost profits (Ashwood's Exs. LLL, MMM, NNN, and the testimony of Henry Lefkowitz) was "clear and convincing" and completely satisfied the requirement, as set forth in *Gilmore*, of providing "some basis for estimating the loss" whereby an "approximately accurate estimate [is] possible."

Before deciding whether or not Ashwood did establish the amount of its lost profits "with any degree of reasonable certainty," the Court must consider if Ashwood is entitled to recover lost profits regardless of whether or not the amount of the profits was established with "reasonable certainty."

Williston on Contracts, Rev'd. Ed., Vol. 5, § 1345, at pp. 3776-8 states:

> "Though any breach of contract entitles the injured party at least to nominal damages, he cannot recover more without establishing a basis for an inference of fact that he has been actually damaged. A mere possibility that the plaintiff might have made a profit if the defendant had kept his contract will not justify damages based on the assumption that the profit would have been made. But though there must be evidence of substantial damage in order to justify recovery of more than a nominal sum, the exact amount need not be shown. Where substantial dam-

age has been suffered, the impossibility of proving its precise limits is no reason for denying substantial damages altogether. Under this principle, profits that the plaintiff would have made if the contract had been carried out may be recovered if their loss was a proximate and natural consequence of the breach, and any reasonable method of estimation is possible, even though the exact amount of profit to have been anticipated is necessarily uncertain. On the other hand, 'such damages cannot be recovered when they are remote, speculative, hypothetical, and not within the realm of reasonable certainty. The nature of the business or venture upon which the anticipated profits are claimed must be such as to support an inference of definite profits grounded upon a reasonably sure basis of facts. When the elements, upon which the claim for prospective profits rests, are numerous and shifting contingencies whose relation to the wrong complained of is problematical, and such profits are not provable with assurance as a trustworthy result of the alleged cause, then there can be no recovery. Manifest ambiguities in ascertaining what would have been the course of events in the face of complicated factors, under circumstances which have never come to pass, and inherent difficulties in calculating the amount of prospective gains prevent the recovery of damages. Pure chances lying between the alleged wrong and the anticipated profits, dependent upon unsettled conditions, render impracticable the assertion of cause and effect.' "

Applying the standard set forth by Williston as quoted above, Ashwood is entitled to lost profits only if such are a "proximate and natural consequence of the breach * * *." Also, Ashwood must establish that the "nature of the business or venture upon which the anticipated profits are claimed must be such as to support an inference of definite profits grounded upon a reasonably sure basis of fact."

Further, Ashwood must show in its claim for lost profits that there are no "pure chances" lying between Timzan's and United's alleged wrongs and the anticipated profits, which chances are "dependent upon unsettled conditions" and "render impracticable the assertion of cause and effect."

It is the Court's view that Ashwood has failed to sustain this burden. Further, there are numerous analogous situations where other courts have denied lost profits due to the breach of a contractor, holding that such lost profits are not the "proximate and natural consequence" of the breach.

In *Friedland v. McNeil,* 33 Mich. 40 (1875), a contractor was responsible for the construction of only a part of the work involved in the eventual completion of the entire building, to wit, the masonry work involved in the building of a church. The contractor failed to complete his work within the stipulated time and the church officials sought to hold the contractor for the loss of pew rents during the period of inexcusable delay. In rejecting the claim, the court said:

> "The contract upon which suit was brought was not one the completion of which was to put the building in condition for the renting of pews. A large amount of other work would still remain to be done, and large expenditures to be made, with which this contractor would have no concern whatever; and the building might never be put in condition for the renting of pews and yet he be in no way responsible. It can never be said that the loss of rents is a necessary, natural or probable result of a particular default, when had no default occurred, the necessary conditions to rent would still be wanting, and might never be supplied. Any claim against this contractor for damages resulting from loss of rents must assume that the trustees had the ability and inclination to pro-

ceed at once to complete the church, and were only delayed by the contractor's default; but damages so remote and contingent would require to be specially claimed by the pleadings, if recoverable at all, which is doubtful."

The rationale behind the decision of *Friedland v. McNeil, supra,* is best explained by the following quotation from page 1242 of an annotation in 125 A.L.R. 1242 covering "Measure of owner's damages for delay of contractor, or breach resulting in delay, where performance of other contract or work was necessary to complete project":

> "Where delay in constructing a building or other improvement, or a breach of contract resulting in delay, is that of the general contractor, or of a contractor whose work will complete the project, it seems that loss of the use of the improvement during the period of the delay is clearly the ordinary, natural result of the contractor's default and is, therefore, to be regarded as within the contemplation of the contracting parties in so far as concerns the basic rule of damages applicable to breaches of contract. * * * But where that which is contracted for is merely a part of the construction or building project, and not the last part of it, peculiar questions arise as to the consequential damages recoverable by the owner in case of delay in the performance of such contract; for, due to want of funds or change of purpose or other cause, the project may not actually have been completed, or actual completion may have been, or still may be, uncertain, or may be problematical as to time, and moreover, the particular contract may be of such a comparatively minor character as to give rise to the inquiry whether the contractor, for his delay in performance or breach causing delay, is to be charged with consequential damages of a magnitude corresponding to the importance of completion of the entire project."

The Timzan contract with Ashwood as well as the takeover agreement of United dealt with only a portion of the Brentwood project. Even if Timzan and United had performed on the contracts, the project at Brentwood required substantial work and expenditure of funds before its completion to a point of making sales and determining any profits. Before Ashwood would realize any profits at Brentwood from the sale of homes, certain other work and improvements had to be completed and homes had to be constructed. In fact, no homes were ever constructed at Brentwood other than the original model homes. It is conceivable that "due to want of funds or change of purpose or other cause" Ashwood would not have constructed homes at Brentwood even had the Timzan contracts been wholly performed. Ashwood's claim for lost profits is not only too remote to be a proper element of damages in this case, but also is contingent upon Ashwood's own performance. United and Timzan agreed simply to construct certain underground improvements at Brentwood. They can be charged only for damages "of a magnitude corresponding to the completion of the entire project."

Such damages do not include total responsibility for the failure of the Brentwood project. Ashwood is entitled to be put in as good a position as if the contract had been performed, but it is not entitled to charge off to United the entire loss incurred by Ashwood at Brentwood, including any profits which hopefully would have been made had the project been a success.

Ashwood also seeks to have this Court hold that "because of the magnitude of its acts and the flagrance of its wrongdoing, United Bonding ought to be ordered to pay the sum of $500,000.00 as and for punitive damages," and argues that the "shameful and deceitful conduct of United Bonding" justifies an award of punitive damages.

The evidence establishes that United wilfully and irresponsibly failed to honor its bonds and the subsequent takeover agreement of April 1, 1965. The Court recognizes that in some instances a minority of courts have allowed the plaintiff in a contract action to recover exemplary or punitive damages in excess of compensation for the actual harm caused by the wrong. But such cases are in a decided minority and Restatement of Contracts, § 342, specifically states that punitive damages are not permissible in contract actions. As stated by Judge Burger in *Brown v. Coates*, 253 F.2d 36 (D.C. Cir. 1958), at page 39:

> "For breaches of contract standing alone, punitive damages are generally not recoverable. Moreover, it is axiomatic that punitive damages are 'not favored.' Some courts have refused to allow the imposition of punitive damages in *any* contract actions, regardless of the types of contracts involved or the circumstances surrounding their breach."

The Court is not so shocked by the "outrageous irresponsibility" of United Bonding's conduct as to feel that an award of punitive damages is necessary or proper.

Ashwood also seeks to recover "its reasonable attorneys' fees" arising from this action. In the absence of an express provision to the contrary in the bond, or of an express statute therefor, no right to recover attorneys' fees exists with respect to the bonds of private building contractors. See *Basic Refractories, Inc. v. Bright*, ____ Nev. ____, 298 P. 2d 810, 59 A.L.R. 2d 457 (1956); and Couch on Insurance 2d, Vol. 16, § 58:9, page 13.

It is the Court's determination that United shall pay the defendant subcontractors the amounts set forth in their respective counterclaims totaling $134,639.04, with interest at 6% from July 31, 1965, in order to discharge the liens such subcontractors perfected against Brentwood. The

Court further determines that United shall pay to Ashwood the sum of $7,958.00 in order to discharge the Empire Excavating lien, and the sum of $47,761.92 for reimbursement of the amount paid by Ashwood to discharge the Price Bros.' lien. Said $47,761.92 is to bear interest at 6% from September 9, 1965, the date Ashwood settled and paid the lien.

Since United has instituted an action for a declaratory judgment pursuant to 28 U.S.C. § 2201, the Court must "declare the rights and legal relations of any interested party seeking such declaration." Accordingly, it is necessary to determine what "rights and legal relations" are created in United by its payment of the sum of $190,358.96 as above set forth.

United, by its payment under its bonds, becomes subrogated to the rights of Timzan and can enforce any rights Timzan may have against Ashwood. As stated by Couch on Insurance 2d, Vol. 16, § 61:382, at pages 437-8:

> "Where a surety on a performance bond of any nature pays an obligation for which its principal is liable, it becomes subrogated thereby to the claim which it has so paid."

This principle is defined in *American Surety Co. of New York v. Robinson,* 53 F.2d 22 (1931), wherein the court stated, at page 23:

> "Subrogation is an invention of equity whereby through a supposed succession to the legal rights of another a loss is put ultimately on that one of the parties before the court on whom it ought equitably to fall. It is freely applied in favor of a surety who discharges his principal's obligation, or makes good his default. It operates to enable the surety to enforce all his principal's rights of reimbursement against others, and all the rights of the creditor against the principal and all securities held for the obligation.

> By analogy to the principle of insurance law whereby an insurer paying a loss may go against even a tort feasor who caused it, the surety may often be subrogated to the independent rights of action of the creditor against third parties."

In other words, United, upon payment of the obligations due the subcontractors, may "enforce all his principal's rights of reimbursement against others." In determining the "rights and legal relations" of United, the Court considers it imperative to resolve the question of whether or not United is entitled to be reimbursed by Ashwood for any payment of the $190,358.96 in subcontractors' claims.

The facts in the instant case establish the following:

(a) Ashwood contracted with Timzan for the installation of certain underground improvements at Brentwood.

(b) By the terms of the contract Timzan was to be paid nothing until "all subject work is completed and inspected and approved by all governing municipal authorities." (see Addenda # 1 to Ashwood's Exs. KK and JJ.)

(c) United provided Timzan with performance bonds whereby it agreed to "pay all persons who have contracts directly with the principal for labor or materials" if the principal fails to "faithfully perform the contract on his part."

(d) Timzan began performance of its contracts, but due to many difficulties unforeseen by both Timzan and Ashwood was unable to "faithfully perform the contract on his part" and several subcontractors of Timzan remained unpaid for work performed.

(e) Upon Timzan's failure, United agreed to take over the performance of Timzan's obligations under the same terms of the contracts. As part of the takeover agreement Timzan waived "any claim, de-

mand, action and/or cause of action for the payment of any funds due it from ASHWOOD," and further agreed that "any such claim, demand, action and/or cause of action is hereby set over and assigned to UNITED." It was further agreed that Ashwood was to pay United "in accordance with the payment schedule set forth in the various Construction Contracts such funds and in such amounts as ASHWOOD would have been obligated to pay TIMZAN." (See para. 5, Joint Defts.' Ex. 22.)

(f) Pursuant to such agreement United took over for Timzan at Brentwood and continued to fulfill Timzan's obligations under its contracts.

(g) United shortly after taking over for Timzan wilfully and intentionally breached its takeover agreement and announced its intentions to not honor its performance bonds.

It is a well-supported rule that where a party has partially but not substantially performed his contract and, under the contract, complete performance by one party is to precede payment by the other, no recovery can be had by the defaulting party either upon an implied assumpsit or upon a quantum meruit if the default was intentional and wilful. See 11 O. Jur. 2d Contracts, § 233; Williston on Contracts, Vol. 5, § 1475.

But the rule is also well settled in Ohio that "the party in default cannot recover either on the contract or in assumpsit for benefit bestowed, but is entitled to credit for such benefit upon any damage resulting from his default." See *Mays v. Hartman,* 81 Ohio App. 408, 77 N.E. 2d 93.

The reasoning behind such rule is set forth in *Kirkland v. Archbold,* 68 Ohio L. Abs. 481, 113 N.E. 2d 496, wherein Judge Skeel of the Cuyahoga County Court of Appeals stated, at page 485:

"The result of decisions which deny a defaulting contractor all right of recovery even though his work has enriched the estate of the other party to the contract is to penalize the defaulting contractor to the extent of the value of all benefit conferred by his work and materials upon the property of the other party. * * *

"An ever-increasing number of decisions of courts of last resort now modify the severity of this rule and permits defaulting contractors, where their work has contributed substantial value to the other contracting party's property, to recover the value of the work and materials expended on a quantum meruit basis, the recovery being diminished, however, to the extent of such damage as the contractor's breach causes the other party."

If the Court were to declare that United is entitled to recover back against Ashwood that portion of the $190,-358.96 which represents "the value of all benefit conferred" to Ashwood by work upon Brentwood, United must have proved by a preponderance of the evidence that Ashwood did receive a substantial benefit as a result of Timzan's and United's partial performance of their contracts.

In its answer to the Ashwood counterclaim, United generally denies the allegations of such counterclaim and, contrary to Rule 8(c) of the Federal Rules of Civil Procedure, does not plead the affirmative defense of part performance which, if proved, would allow it to set off against a $190,358.96 judgment of this Court the amount of money representing "the value of all benefit conferred" upon Ashwood resulting from Timzan's and United's partial performance. Additionally, United failed at trial to offer any proof whatsoever that would support a claim that Ashwood did receive "substantial benefit" from any work which was done at Brentwood.

The withdrawal of Timzan, United's repudiation of liability under its bonds and takeover agreement, the expiration of the Prudential commitment, and the proven fact that a portion of the work performed by Timzan and United failed to meet the specifications in the Timzan contracts, which would have to be corrected at great expense to Ashwood, are conclusive proof that Ashwood did not receive *a substantial benefit* as a result of work performed by Timzan or United.

United's position throughout this lawsuit has been characterized by its insistence that it owes no obligation whatsoever. The Court has concluded that this illusory contention is completely unsupported by the evidence, and therefore cannot permit United to prevail upon any equitable doctrine of subrogation which it has neither alleged nor proved.

The purpose of subrogation is to allow one party to succeed to the legal rights of another so that the loss can ultimately fall "on that one of the parties before the court on whom it ought equitably to fall." It is the Court's decision that any loss resulting from payment of the subcontractors' liens "ought equitably to fall" on United since United failed totally to offer any evidence to the Court to the contrary.

In light of the foregoing analysis, which the Court deems to be necessary to meet the numerous issues in this rather complicated case, the Court summarizes its conclusions as follows:

1. The Court has jurisdiction of the parties and of the subject matter of this suit.

2. Under its Bonds Nos. CG-1097, CG-1098, and CG-1099 and the takeover agreement of April 1, 1965, United is bound to pay all persons who performed work

at Brentwood for Timzan and United for the reasonable value of such work.

3. Central Excavating performed work and services at Brentwood for Timzan and United, the reasonable value of which was $78,573.66, and is entitled to judgment against United for such amount with interest at the rate of six per cent (6%) per annum from July 31, 1965.

4. Arrow Builders Supply performed work and services at Brentwood for Timzan and United, the reasonable value of which was $37,552.55, and is entitled to judgment against United for such amount with interest at the rate of six per cent (6%) per annum from July 31, 1965.

5. Air Compressor Rental performed work and services at Brentwood for Timzan and United, the reasonable value of which was $12,000.00, and is entitled to judgment against United for such amount with interest at the rate of six percent (6%) per annum from July 31, 1965.

6. Arturo Construction performed work and services at Brentwood for Timzan and United, the reasonable value of which was $5,577.00, and is entitled to judgment against United for such amount, with interest at the rate of six per cent (6%) per annum from July 31, 1965.

7. J. J. Turner performed work and services at Brentwood for Timzan and United, the reasonable value of which was $935.63, and is entitled to judgment against United for such amount with interest at the rate of six per cent (6%) per annum from July 31, 1965.

Under United's Bonds No. CG-1097, CG-1098, and CG-1099 and the takeover agreement of April 1, 1965, Ashwood is entitled to judgment against United for all damages which proximately and naturally resulted from United's breach of said bonds and the takeover agreement. These damages are itemized as follows:

(a) the penalty fee Ashwood was required to pay Prudential for failure to take the Prudential loan commitment $19,312.50

(b) the amount necessary for Ashwood to discharged the Empire Excavating lien ---------- 7,958.00

(c) the bond premium of Progressive Mutual Insurance Company ------- 7,200.00

(d) the amount paid by Ashwood to Women's Federal for loan and appraisal fees ---------- 15,750.00

(e) the amount paid by Ashwood to Lawyers Title for title and escrow fees --- 2,400.00

(f) the amount paid by Ashwood in settlement of the Price Bros. lien -------- 47,761.92

Judgment will be rendered in favor of Ashwood and against United in the total sum of $100,382.42. Judgment also will be rendered in favor of Ashwood and against United for interest at the rate of six per cent (6%) per annum on the sum of $47,761.92 from September 9, 1965, and for interest at the rate of six per cent (6%) per annum on $44,662.50 from October 12, 1965. Since Ashwood has not paid the Empire Excavating lien, no interest will be awarded upon the amount of that lien, to wit, $7,958.00.

The foregoing memorandum is adopted as the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Judgment will be entered in accord herewith and Ashwood is instructed to prepare the entry.

GIRARD E. KALBFLEISCH,
Chief Judge.

APPENDIX 2.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided August 11, 1969.)

Before: WEICK, Chief Judge, McCREE, Circuit Judge and McALLISTER, Senior Circuit Judge.

PER CURIAM. This case involves questions as to the liability of the surety, United Bonding Insurance Company (United), to its obligee, Ashwood Construction Company (Ashwood), and to subcontractors who furnished labor, material and necessary tools to the principal, Timzan, Inc. (Timzan), for certain construction in connection with the Brentwood Subdivision in Cuyahoga County, Ohio.

United was surety on bonds which were conditioned not only for the faithful performance of the construction contracts by the contractor Timzan but also for the payment of "all persons who have contracts directly with the Principal [Timzan] for labor and materials."

The contractor Timzan defaulted and United, Ashwood and Timzan entered into an agreement whereby United took over the performance of the construction contracts and agreed "to assume all of the obligations of Timzan under its various Construction Contracts."

About five weeks after entering into the take-over agreement, United advised Ashwood by telegram that the performance bonds which it had executed were "null and void from their inception" and it repudiated its liability not only on the bonds but also under the take-over agreement. On June 14, 1965, United filed its complaint for declaratory judgment in the District Court seeking a determination of its rights and liabilities.

The District Judge, who heard the case without a jury, held United liable under the bonds and the take-over agreement. He awarded damages to Ashwood for wilful

breach of contract by United and rendered judgment against United in favor of subcontractors and persons who furnished labor, material and necessary tools in connection with performance of the contracts. United has appealed and Ashwood cross-appealed.

We have reviewed the extensive findings of fact of Chief Judge Kalbfleisch and find that they are supported by substantial evidence and are not clearly erroneous. Rule 52(a), Fed. R. Civ. P. His conclusions of law are correct.

The judgment of the District Court is therefore affirmed.

APPENDIX 3.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed September 4, 1969.)

Before WEICK, Chief Judge, McCREE, Circuit Judge, and McALLISTER, Senior Circuit Judge.

Upon consideration, it is ORDERED that the petition for rehearing be and it is hereby denied.

Entered by order of the Court.

CARL W. REUSS,
Clerk.